Supreme Court, U.S.
FILED
JAN 28 1994
CLERK

No. 93-863

In The

Supreme Court of the United States

October Term, 1993

GEORGE L. KREGOS, doing business as American Sports Wire,

Petitioner,

v.

THE ASSOCIATED PRESS, SPORTS FEATURE SYNDICATE, INC., COMPUTER SPORTS WORLD, KEITH GLANTZ, RUSSELL CULVER,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENT THE ASSOCIATED PRESS IN OPPOSITION

NICHOLAS L. COCH
Attorney for Respondent
The Associated Press
1251 Avenue of the Americas
New York, New York 10020
(212) 827-3000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court and the Court of Appeals for the Second Circuit properly found that Kregos' claims presented no genuine issue of material fact and that defendants were entitled to judgment as a matter of law.

2. Whether Rule 56 of the Federal Rules of Civil Procedure violates the Seventh Amendment to the United States Constitution.

3. Whether the District Court and the Court of Appeals for the Second Circuit properly found that under *Feist Publications Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 111 S.Ct. 1282 (1991), the scope of copyright protection in a compilation is thin.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REASONS FOR DENYING THE WRIT 1

CONCLUSION 4

TABLE OF AUTHORITIES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986) 1

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986) 1

Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 111 S.Ct. 1282 (1991) 2

Stone v. Williams, 970 F.2d 1043 (2nd Cir. 1992) 3, 4

Taylor v. Meirick, 712 F.2d 1112 (7th Cir. 1983) 3

Woods Hole Oceanographic Institute v. Goldman, 228 U.S.P.Q. 872 (S.D.N.Y. 1985) 3

REASONS FOR DENYING THE WRIT

The Petition should be denied because (i) Petitioner George Kregos has raised no significant question of federal law that merits the attention of this Court and (ii) there is no conflict among the Courts of Appeals for any Circuit relevant to the disposition of this case.

I.

KREGOS HAS NOT RAISED ANY SIGNIFICANT ISSUE OF FEDERAL LAW

In his statement of questions presented, Kregos raises only three issues, none of which merit the attention of this Court.

The first issue Kregos raises is whether the District Court and the Court of Appeals properly found that, as a matter of law, there could be no infringement of the original elements of Kregos' pitching form by the defendants' pitching form. Kregos does not claim that either the District Court or the Court of Appeals applied an improper standard to determine whether a genuine issue of material fact existed. Kregos' only real argument is that in applying the correct standard, the two courts below reached an incorrect result.

The second issue Kregos raises is whether the grant of summary judgment under Rule 56 of the Federal Rules of Civil Procedure deprives him of his right to a trial by jury as guaranteed by the Seventh Amendment. While this is a broad issue, it is a frivolous one. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986),

confirm the desirability of summary judgment in appropriate circumstances. If there is a serious argument that summary judgment under Rule 56 of the Federal Rules of Civil Procedure is unconstitutional, Kregos has not made it. Moreover, to the extent that Kregos argues that the courts below misapplied Rule 56 in finding that *he* presented no genuine issue of material fact, Kregos has not presented an issue warranting the attention of this Court.

The third issue Kregos raises is whether the decisions of the District Court and the Court of Appeals are consistent with *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 111 S.Ct. 1282 (1991). Contrary to Kregos' claim at 14-15 of the Petition, the lower courts did not "require exact identity between a copyrighted work and copied work" as a prerequisite to a finding of copyright infringement where the copyrighted work is a compilation. To the contrary, both the District Court and the Court of Appeals applied the test whether the original elements of the Kregos pitching form were substantially similar to defendants' pitching form. *Kregos v. Associated Press*, 795 F.Supp. 1325, 1333 (S.D.N.Y. 1992), *aff'd*, 3 F.3d 656, 664 (2nd Cir. 1993). That is completely consistent with this Court's opinion in *Feist*, 499 U.S. at 362-373, 111 S.Ct. at 1296. Accordingly, the courts below have done nothing more than apply a recent precedent of this Court, albeit in a manner in which Kregos has found desirable.

Accordingly, Kregos has raised no substantial issue of federal law that requires the attention of this Court.

II.

THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS

There is no conflict among the Courts of Appeals as to the proper outcome of this case. Kregos does not argue to the contrary. Rather, Kregos states at 8-9:

> Petitioner also contends that the copyright statute of limitations should be equitably tolled based upon the continuous-infringement doctrine, as exemplified by *Taylor v. Merrick,* 712 F.2d 1112 (7th Cir. 1983), and *Woods Hole Oceanographic Institute v. Goldman,* 228 USPQ 872 (S.D.N.Y. 1985). *These decisions appear to conflict* with *Stone v. Williams,* 970 F.2d 1043 (2d Cir. 1992) relied upon by the Court of Appeals in affirming the grant summary judgment against Petitioner. (Emphasis added.)

Despite Kregos' statement that these "decisions appear to conflict," the decision *below* does not in any way conflict with *Taylor v. Meirick,* 712 F.2d 1112 (7th Cir. 1983). Rather, the court below expressly stated that the holding of *Taylor* is "inapplicable on these facts." 3 F.3d at 662. In *Taylor,* the Court of Appeals allowed a copyright owner to apply the "continuous infringement doctrine" and extend the statute of limitations beyond the three year period set forth in the Copyright Act where the defendant had actively concealed the infringement. That holding does not in any way conflict with the decision of the Court of Appeals in this case, because the allegedly infringing 1984 pitching form of defendants appeared in newspapers published throughout the United States. Moreover, Kregos' suggestion of a conflict between *Taylor*

and *Stone v. Williams*, 970 F.2d 1043 (2nd Cir. 1992) *cert. denied*, 113 S.Ct. 2331 (1993), a case cited by the court below, is belied by this Court's refusal to grant a writ of certiorari in *Stone*. Thus, Kregos has identified no conflict among the Courts of Appeals that merits the attention of this Court.

CONCLUSION

For the reasons set forth above, the Court should deny Kregos' petition for a writ of certiorari.

Dated: January 28, 1994

NICHOLAS L. COCH
Attorney for Respondent
The Associated Press
1251 Avenue of the Americas
New York, New York 10020
(212) 827-3000

WILLIAM DUNNEGAN
SHEA & GOULD
1251 Avenue of the Americas
New York, New York 10020
(212) 827-3000

Of Counsel.